

No. 10326

United States
Circuit Court of Appeals
For the Ninth Circuit. 23

H. A. PIERCE,

Appellant,

vs.

ALBERT L. WAGNER,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Northern Division

FILED

JAN 9 - 1943

PAUL P. O'BRIEN,
CLERK

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United States
Circuit Court of Appeals
For the Ninth Circuit.

H. A. PIERCE,

Appellant,

vs.

ALBERT L. WAGNER,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Northern Division



LAW OFFICER OF
LOEB AND LOEB
610 Pacific Mutual Bldg.,
523 West Sixth Street,
Los Angeles, California.

April 7, 1943

Honorable Paul P. O'Brien
Clerk, Circuit Court of Appeals
U.S. Post Office Building,
San Francisco, California

Re: Piantadosi v. Loew's Incorporated

Dear Mr. O'Brien:

According to the newspapers of April 5, 1943, the Witmark case, 125 Fed. (2) 949, cited on pages 6 and 7 of our answering brief, has been affirmed by the United States Supreme Court.

We should appreciate it very much if you would call this to the attention of the court in connection with the above appeal.

A copy of this letter has been sent to counsel for appellant.

Thanking you for your courtesy, I am

Very truly yours

s/ Milton H. Schwartz
of Loeb and Loeb

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

Attorney for Appellant:

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Yeon Bldg.,
Portland, Ore.

Attorneys for Appellee:

VAN DYKE & HARRIS,

Calif-Western States Life Bldg.,
Sacramento, Calif.

In the District Court of the United States
for the Northern District of California
Northern Division

No. 4311

H. A. PIERCE,

Plaintiff,

vs.

ALBERT L. WAGNER,

Defendant.

COMPLAINT

Comes now plaintiff and complains of defendant and alleges as follows:

I.

That plaintiff is a resident and citizen of the State of Oregon and defendant is a resident and citizen of the State of California.

II.

That the amount involved in this action and the sum in issue herein between plaintiff and defendant exceeds the sum of \$3000.00.

III.

That on or about December 22, 1928, Walter V. Pierce, a resident of Sacramento County, California, died testate in the State of California leaving an estate in said county and state.

IV.

That each of the following persons was an heir and devisee of said Walter V. Pierce and entitled to and decreed an undivided one-sixth interest in said estate and the assets thereof, to-wit:

H. A. Pierce

H. P. Pierce

C. C. Pierce

O. H. Pierce

V.

That the principal assets of said estate consisted of real property; that there were no encumbrances thereon but that said property was income property and that there were no debts owing [1*] by decedent at the time of his death and that the only obligations that were payable out of the assets of said estate before distribution to the creditors thereof were inheritance tax, funeral bill and expenses of administration.

VI.

That under and by virtue of the will left by said testator, L. B. Pierce was appointed executor of said estate and said L. B. Pierce so qualified and acted.

VII.

That in the early part of 1933, Reuben G. Lenske, an attorney at law in Portland, Oregon, was engaged to represent the aforesaid four heirs and

*Page numbering appearing at foot of page of original certified Transcript of Record.

devisees of said estate on a contingent basis for the purpose of hastening the distribution of said estate and obtaining the best possible distribution for each of said heirs and devisees and to look after their interest in said estate and the property therein until said heirs shall have realized their just portion of the said estate and the proceeds of the property thereof.

VIII.

That at said time no distribution had been made to said heirs and the expenses of administration and inheritance tax and funeral bill had not as yet been paid by said executor and said executor was using a portion of the property of the estate for his own benefit without payment of any rent to said estate.

IX.

That Reuben G. Lenske is and at all times herein mentioned has been an attorney at law **admitted to** and practicing in all courts in the State of Oregon and is a resident of the **City of Portland and State** of Oregon and that at all times herein mentioned defendant has been and now is an attorney at law practicing in the City of Sacramento and State of California and is a resident of the said City and State. [2]

X.

That in June, 1933 Reuben G. Lenske engaged defendant as associate counsel and said attorneys agreed as follows:

(a) That defendant would become associated with Reuben G. Lenske in representing said heirs in all matters pertaining to said estate and the property therein until said estate shall have been fully administered and the property therein shall have been sold and the proceeds divided amongst the heirs entitled thereto.

(b) That defendant would render all services that were necessary to properly represent said heirs in the matters hereinabove stated, except as herein otherwise provided.

(c) Defendant agreed to keep Reuben G. Lenske fully informed of all developments in connection with said estate and said property and all matters of pertinence thereto and to advise Reuben G. Lenske of any important steps that might or should be taken and to consult with him by correspondence concerning the same.

(d) That defendant agreed that within a reasonable time after he was so engaged as associate counsel, he would arrive at an understanding with two of said heirs and devisees, who lived in or near Sacramento, California, on a specific percentage basis that said attorneys were to operate on in their representation of said heirs.

(e) Defendant agreed that he would promptly, efficiently and loyally handle all matters in connection with said estate, said property and the proceeds thereof as associate counsel of Reuben G. Lenske for said four heirs.

(f) Defendant agreed that all fees of any and

all kinds which might be paid or payable to defendant, or defendant and Reuben G. Lenske as counsel for said four heirs, or in any direct connection with said estate or the property therein, should be divided equally until said estate shall have been closed, the property [3] sold and all of the proceeds thereof distributed to the heirs in accordance with their rights.

XI.

That defendant violated said agreement and was guilty of breaches thereof and was negligent in rendering said services in the following respects:

(a) Defendant failed to keep Reuben G. Lenske fully and promptly informed of steps taken or steps that were about to be taken or were contemplated in the course of the administration of said estate.

(b) Defendant failed to maintain the goodwill of the said two California heirs and devisees towards Reuben G. Lenske.

(c) Defendant attempted to obtain the right of personal representation of said two heirs and attempted to exclude Reuben G. Lenske as one of the attorneys for said two heirs.

(d) Defendant failed to arrive at an understanding with said two heirs for an exact percentage basis, which defendant and Reuben G. Lenske would receive out of the interest of said two heirs in said estate and property until after Reuben G. Lenske necessarily incurred considerable ex-

pense and expended time and energy towards accomplishing that which defendant had failed to do within a reasonable time.

(e) That defendant failed to prepare and present orders to the court in which proceedings concerning said estate were pending and after oral orders were made, until a long period expired after said oral orders were made.

(f) Defendant failed to render prompt information concerning important matters in said estate.

(g) Defendant failed to cooperate with Reuben G. Lenske in causing hearings to be set at suitable and advisable times.

(h) Defendant collected fees to which Reuben G. Lenske and defendant were entitled to participate in equal parts but defendant [4] failed to remit one-half thereof to Reuben G. Lenske.

(i) Without consultation with Reuben G. Lenske or plaintiff, defendant permitted and arranged for the appointment of one C. K. Curtright as referee in a partition suit concerning the real property in said estate instead of accepting the responsibility of said refereeship himself and thereby caused unnecessary and improper expenditures to the detriment to each of the heirs and devisees including Reuben G. Lenske as one of the assignees of a portion of said estate.

XII.

That as a result of said wrongful, negligent and improper conduct of defendant, said Reuben G. Lenske suffered pecuniary loss in that he had to

and did expend time and money in making numerous trips to Sacramento and in that he failed to receive his full portion of the fees in connection with the said estate and property, and in that the amount of money available for fees for him was less than that which he would otherwise have received, all to his damage and loss in the sum of \$1600.00.

XIII.

That prior to the commencement of this action, Reuben G. Lenske transferred and assigned all of his right, interest and cause herein to plaintiff *is* the holder thereof.

As a second cause of action herein plaintiff alleges as follows:

I.

Realleges all of the allegations of Paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X and XI of plaintiff's first cause of action herein the same as if the said paragraphs and allegations were fully set forth haec verba.

II.

That defendant became associated with Reuben G. Lenske as [5] counsel for plaintiff in representing plaintiff in all matters pertaining to the said estate and the property therein, including the sale of said property and the management thereof.

III.

That defendant received and had in his possession monies to which plaintiff was entitled and failed

to remit the same until demand was made upon him and until more than a reasonable length of time expired after he received the same.

IV.

That as a result of the negligent, improper and wrongful conduct of defendant as hereinabove set forth, including the paragraphs realleged from the first cause of action herein, plaintiff has been damaged in the sum of \$1600.00.

Wherefore plaintiff prays judgment against defendant for the sum of \$1600.00 on his first cause of action herein and the further sum of \$1600.00 on his second cause of action herein, making a total sum of \$3200.00 and for his costs and disbursements incurred herein.

/s/ REUBEN G. LENSKE

Attorney for Plaintiff [6]

State of Oregon,

County of Multnomah—ss.

I, H. A. Pierce being first duly sworn say that I am the plaintiff in the within entitled cause and the foregoing complaint is true as I verily believe.

/s/ H. A. PIERCE

Subscribed and sworn to before me this 10th day of April, 1941.

[Notarial /s/ R. G. LENSKE

Seal]

Notary Public for Oregon.

My Commission Expires 7/1/41.

I hereby certify that the foregoing is a full, true and correct copy of the original complaint herein.

.....

Attorney for Plaintiff.

[Endorsed]: Filed April 15, 1941.

[Title of District Court and Cause.]

MOTION FOR ORDER DISMISSING COMPLAINT, OR IN LIEU THEREOF FOR ORDER FOR MORE DEFINITE STATEMENT

Comes now defendant above named and moves the above entitled Court for an order as follows:

1. To dismiss said action on the ground that plaintiff's complaint on file herein fails to state a claim upon which relief can be granted, and upon the further ground that the Court does not have jurisdiction of the subject matter, the actual amount in controversy being less than \$3,000.00, in that the amount claimed to be due plaintiff by defendant was not set forth in said complaint in good faith, but that said amount was set forth for the sole purpose of making it appear that the above entitled Court has jurisdiction of the subject matter, all of which appears on the face of said complaint. [7]

2. In the event said motion to dismiss is denied, defendant moves said Court for an order requiring and directing plaintiff to serve and file herein a

more definite statement of facts in the following particulars:

a. A statement showing the amount of damage suffered, as a result of the several alleged breaches of the agreement as set forth in each of subparagraphs "a" to and including "1" of paragraph XL of said first cause of action;

b. A statement showing the amount of fees collected by defendant, one-half of which said Reuben G. Lenske was entitled to, as alleged in subparagraph "h" of paragraph XI of said first cause of action;

c. A statement showing the specific amount of each of *each* element of damage alleged in said paragraph XI.

d. A statement showing the manner in which the total amount of damage alleged in paragraph XII of said first cause of action was computed;

e. A statement showing how and in what manner and in what amount said Reuben G. Lenske was damaged as a result of each and all of the alleged breaches set forth in subparagraphs a, b, c, d, e, f, g, and i of said paragraph XI of said first cause of action;

f. A statement showing the causal connection between the alleged breaches of said agreement set forth in said paragraph XI of said first cause of action, and the general allegation of damage set forth in paragraph XII of said first cause of action;

g. A statement showing: the number of trips made by said Reuben G. Lenske to Sacramento,

California, the amount expended by said Reuben G. Lenske on each of said trips, the amount of time consumed in making said trips to Sacramento, and the amount of pecuniary loss as a result thereof, the amount which said Reuben G. Lenske failed to receive as his share of said fees, and the amount said fees were diminished as a result of the [8] alleged "wrongful, negligent and improper conduct" of defendant,—as alleged in paragraph XII of said first cause of action;

h. A statement showing how and in what manner plaintiff suffered any damage as a result of the alleged breaches of said agreement between defendant and said Reuben G. Lenske, and showing the amount of damage suffered by plaintiff by reason thereof, and the causal connection between said alleged breaches and the damage alleged to have been suffered by plaintiff;

i. A statement showing: the amount of monies received and held by defendant as alleged in paragraph III of the second cause of action set forth in said complaint, and the length of time defendant unreasonably withheld the same, and the amount of damages claimed as a result thereof, and facts showing the basis upon which said damage is claimed and the method whereby the same is computed.

Said motion will be made upon the ground that said allegations of said complaint are not *avered* with sufficient definiteness and particularity to enable said defendant to properly prepare his responsive pleading herein or to prepare for trial.

In support of the above motions defendant will rely upon all of the pleadings and papers on file in this action, and upon oral and documentary evidence to be adduced at the hearing thereof.

Dated: July 1, 1941.

ANSON H. MORGAN

Attorney for Defendant
402 Farmers & Mechanics
Building, Sacramento,
California.

[Endorsed]: Filed July 1, 1941. [9]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of San Francisco, on Wednesday, the 6th day of May, in the year of our Lord one thousand nine hundred and 42.

Present: The Honorable Martin I. Welsh,
District Judge.

[Title of Cause.]

The motion to dismiss or in lieu thereof for order for more definite statement having been heretofore heard and submitted, being now fully considered, it is Ordered that the motion to dismiss be and the same is hereby denied. It is further Ordered that the motion for a more definite statement be and the same is hereby granted. [10]

[Title of District Court and Cause.]

AMENDED COMPLAINT

Comes now plaintiff and complains of defendant and alleges as follows:

I.

That plaintiff is a resident and citizen of the State of Oregon and defendant is a resident and citizen of the State of California.

II.

That the amount involved in this action and the sum in issue herein between plaintiff and defendant exceeds the sum of \$3000.00.

III.

That on or about December 22, 1928, Walter V. Pierce, a resident of Sacramento County, California, died testate in the State of California leaving an estate in said county and state.

IV.

That each of the following persons was an heir and devisee of said Walter V. Pierce and entitled to and decreed an undivided one-sixth interest in said estate and the assets thereof, to-wit:

H. A. Pierce

H. P. Pierce

C. C. Pierce

O. H. Pierce

V.

That the principal assets of said estate consisted of real property; that there were no encumbrances thereon but that said property was income property and that there were no debts owing [11] by decedent at the time of his death and that the only obligations that were payable out of the assets of said estate before distribution to the creditors thereof were inheritance tax, funeral bill and expenses of administration.

VI.

That under and by virtue of the will left by said testator, L. B. Pierce was appointed executor of said estate and said L. B. Pierce so qualified and acted.

VII.

That in the early part of 1933, Reuben G. Lenske, an attorney at law in Portland, Oregon, was engaged to represent the aforesaid four heirs and devisees of said estate on a contingent basis for the purpose of hastening the distribution of said estate and obtaining the best possible distribution for each of said heirs and devisees and to look after their interest in said estate and the property therein until said heirs shall have realized their just portion of the said estate and the proceeds of the property thereof.

VIII.

That at said time no distribution had been made to said heirs and the expenses of administration and inheritance tax and funeral bill had not as yet

been paid by said executor and said executor was using a portion of the property of the estate for his own benefit without payment of any rent to said estate.

IX.

That Reuben G. Lenske is and at all times herein mentioned has been an attorney at law admitted to and practicing in all courts in the State of Oregon and is a resident of the City of Portland and State of Oregon and that at all times herein mentioned defendant has been and now is an attorney at law practicing in the City of Sacramento and State of California and is a resident of the said City and State. [12]

X.

That in June, 1933 Reuben G. Lenske engaged defendant as associate counsel and said attorneys agreed as follows:

(a) That defendant would become associated with Reuben G. Lenske in representing said heirs in all matters pertaining to said estate and the property therein until said estate shall have been fully administered and the property therein shall have been sold and the proceeds divided amongst the heirs entitled thereto.

(b) That defendant would render all services that were necessary to properly represent said heirs in the matters hereinabove stated, except as herein otherwise provided.

(c) Defendant agreed to keep Reuben G. Lenske fully informed of all developments in connection with said estate and said property and all

matters of pertinence thereto and to advise Reuben G. Lenske of any important steps that might or should be taken and to consult with him by correspondence concerning the same.

(d) That defendant agreed that within a reasonable time after he was so engaged as associate counsel, he would arrive at an understanding with two of said heirs and devisees, who lived in or near Sacramento, California, on a specific percentage basis that said attorneys were to operate on in their representation of said heirs.

(e) Defendant agreed that he would promptly, efficiently and loyally handle all matters in connection with said estate, said property and the proceeds thereof as associate counsel of Reuben G. Lenske for said four heirs.

(f) Defendant agreed that all fees of any and all kinds which might be paid or payable to defendant, or defendant and Reuben G. Lenske as counsel for said four heirs, or in any direct connection with said estate or the property therein, should be divided equally until said estate shall have been closed, the property sold and all of the proceeds thereof distributed to the heirs in accordance with their rights. [13]

XI.

That defendant violated said agreement and was guilty of breaches thereof and was negligent in rendering said services in the following respects:

(a) Defendant failed to keep Reuben G. Lenske fully and promptly informed of steps taken or

steps that were about to be taken or were contemplated in the course of the administration of said estate.

(b) Defendant failed to maintain the goodwill of the said two California heirs and devisees towards Reuben G. Lenske.

(c) Defendant attempted to obtain the right of personal representation of said two heirs and attempted to exclude Reuben G. Lenske as one of the attorneys for said two heirs.

(d) Defendant failed to arrive at an understanding with said two heirs for an exact percentage basis, which defendant and Reuben G. Lenske would receive out of the interest of said two heirs in said estate and property until after Reuben G. Lenske necessarily incurred considerable expense and expended time and energy towards accomplishing that which defendant had failed to do within a reasonable time.

(e) That defendant failed to prepare and present orders to the court in which proceedings concerning said estate were pending and after oral orders were made, until a long period expired after said oral orders were made.

(f) Defendant failed to render prompt information concerning important matters in said estate.

(g) Defendant failed to cooperate with Reuben G. Lenske in causing hearings to be set at suitable and advisable times.

(h) Defendant collected fees to which Reuben G. Lenske and defendant were entitled to participate

in equal parts but defendant [14] failed to remit one-half thereof to Reuben G. Lenske.

(i) Without consultation with Reuben G. Lenske or plaintiff, defendant permitted and arranged for the appointment of one C. K. Curtright as referee in a partition suit concerning the real property in said estate instead of accepting the responsibility of said refereeship himself and thereby caused unnecessary and improper expenditures to the detriment to each of the heirs and devisees including Reuben G. Lenske as one of the assignees of a portion of said estate.

XII.

That as a result of said wrongful, negligent and improper conduct of defendant, said Reuben G. Lenske suffered pecuniary loss in that he had to and did expend time and money in making numerous trips to Sacramento and in that he failed to receive his full portion of the fees in connection with the said estate and property, and in that the amount of money available for fees for him was less than that which he would otherwise have received, all to his damage and loss in the sum of \$2920.80 as is more specifically set forth herein.

XIII.

That by virtue of the premises as heretofore alleged, Reuben G. Lenske made the following trips from Portland, Oregon to Sacramento, California and spent a minimum of three days at each trip in travelling to and from and appearing in Sacra-

mento, California immediately prior to and after October . ., 1935, March 13, 1936, September 29, 1936 and December 7, 1936; that Reuben G. Lenske was damaged in the sum of \$189.30 by way of actual travelling expenses, fare, meals, hotels and miscellaneous expenditures in said trips.

XIV.

That Reuben G. Lenske was further damaged in the sum of \$900.00 as reasonable attorney fees for the time so expended. [15]

XV.

That by virtue of the premises Reuben G. Lenske was further damaged in that he expended monies for telegrams, copies of papers from clerks and similar expenditures in a sum exceeding \$10.00.

XVI.

That defendant collected the following fees, to which Reuben G. Lenske was entitled to one-half and which defendant failed and refused to remit any portion to him: November 3, 1939 \$210.00, July 3, 1940 \$350.00, October 21, 1940 \$145.00; that Reuben G. Lenske is entitled to one-half of said sums or \$352.50 together with interest thereon at the legal rate.

XVII.

That by virtue of the premises a referee's fee in the sum of \$300.00 was unnecessarily incurred in the sale of the property administered in said estate, resulting in loss and damage to Reuben G. Lenske

in the sum of \$26.00, being his portion of the contingent loss by said expenditure.

XVIII.

That on November 21, 1938 defendant received \$616.62 in fees to which Reuben G. Lenske was entitled to one-half; that defendant failed and refused to advise Reuben G. Lenske of the same until said fact was otherwise ascertained and at no time did he share said fee with Reuben G. Lenske but the same was equalized in March, 1939 when Reuben G. Lenske received an equal sum; that defendant is liable for interest on one-half of \$616.62 at the legal rate from November 21, 1938 until March 1939.

XIX.

That by virtue of the premises fees were allowed for the Executor of said estate and his attorney, which should not have been allowed if defendant had acted diligently and pursuant to said agreement; that said fees totalled approximately \$3032.44 and Reuben G. Lenske was damaged in the sum of \$267.00, being his share of the con- [16] tingent fee receivable from the said estate and properties.

XX.

That by virtue of the premises \$1440.14 was paid out and distributed to or for the trustee of a missing heir, which would otherwise inure to the benefit of all of the other heirs and a portion thereof would have inured to fees to Reuben G. Lenske in the

sum of \$126.00 and he was therefore damaged in said sum of \$126.00.

XXI.

That by virtue of the premises Reuben G. Lenske was required to expend time and work in correspondence and in sending wires and performing other services in connection with the matters hereinabove set forth that should and would not have been necessary had defendant performed his agreement as above set forth; that \$100.00 is a reasonable sum for such time and services so expended.

XXII.

That by virtue of the premises and the failure of defendant to arrive at an agreement with the aforesaid heirs for the amount of fees and his failure to render the services as agreed, the net amount of fees of Reuben G. Lenske was less than it would and should have been by the sum of \$950.00 and he was damaged in said sum.

XXIII.

That by virtue of the premises Reuben G. Lenske was damaged in the total sum of \$2920.80 and that prior to the commencement of the within action, Reuben G. Lenske transferred and assigned said cause to plaintiff and plaintiff is the holder thereof.

As a second cause of action herein plaintiff alleges as follows:

I.

Realleges all of the allegations of Paragraphs I,

II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI, XXII, and XXIII of plaintiff's first cause of action herein the same as if the said paragraphs and allegations were fully set forth herein. [17]

II.

That defendant became associated with Reuben G. Lenske as counsel for plaintiff in representing plaintiff in all matters pertaining to the said estate and the property therein, including the sale of said property and the management thereof.

III.

That as a result of the negligent, improper and wrongful conduct of defendant as hereinabove set forth, including the paragraphs realleged from the first cause of action herein, plaintiff has been damaged in the sum of \$970.40, which sum is more specifically set out as follows:

IV.

That by virtue of the premises \$972.15 was paid to the trustee of a missing heir in lieu of the five brothers of decedent in equal shares, one of whom is plaintiff.

V.

That by virtue of the premises the following sums were paid out of said estate that should and would have inured to the five persons hereinabove mentioned, including plaintiff, to-wit: Fees of Executor and his attorney \$3,032.44, Referee's fees

\$300.00, Interest on delinquent inheritance tax
\$399.94.

VI.

That by virtue of the premises interest on rent owing by the Executor was not paid by him or charged against him, to loss in a sum in excess of \$800.00.

VII.

That by virtue of the premises \$467.99 was paid to said trustee for a missing heir in lieu of the five heirs of an estate in Iowa, of which five heirs plaintiff was one and of which sum plaintiff should have received one fifth.

VIII.

That by virtue of the premises various other disbursements [18] were made out of said estate that would and should have been disallowed if defendant had diligently carried out said agreement and that said items are \$95.00 additional executor's fees, \$32.50 bond premium, \$69.80 costs, \$150.00 to title company and \$8.80 for safe deposit box.

IX.

That plaintiff was entitled to one fifth of said sums less 22½% and was therefor damaged in the sum of \$970.40.

Wherefore plaintiff prays judgment against de-

fendant for the sum of \$3891.20 with interest and costs and disbursements.

REUBEN G. LENSKE

Attorney for Plaintiff

825 Yeon Bldg.

Portland, Ore.

Be. 3115.

[Endorsed]: Filed June 5, 1942. [19]

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS ACTION,
AND MOTION FOR A MORE DEFINITE
STATEMENT

Comes now the defendant, Albert L. Wagner,
and moves the Court as follows:

I.

To dismiss the action because the complaint fails to state a claim against the said defendant, upon which relief can be granted.

II.

To dismiss the action because the Court lacks jurisdiction of the cause, in that the amount in controversy is less than three thousand (\$3,000.00) dollars.

III.

For a more definite statement of the allegations of [20] plaintiff's complaint, in the following particulars.

(a) Said complaint is indefinite in that the acts of negligence alleged to have been committed by defendant are not specifically set forth, and in that there is no allegation as to any of said acts of negligence that the same caused damage to plaintiff or his assignor or that the various acts of the Court in which the Estate of Pierce was being probated would have been different had the defendant not been negligent, nor is it alleged in this connection how or why any negligence of the defendant proximately caused any damage to plaintiff or his assignor;

(b) The complaint is indefinite in that it does not appear therein why or how the alleged breaches of the alleged agreement between plaintiff's assignor and defendant could, would or did cause any damage to plaintiff's assignor or plaintiff, and in this connection defendant makes the following specifications;

1. It does not appear why defendant's alleged failure to keep plaintiff's assignor informed of steps taken in the course of the administration of the Estate of Pierce could or did cause him or plaintiff any damage;

2. How defendant's alleged attempt to obtain the right of personal representation of said two heirs could or did cause damage to plaintiff or his assignor;

3. How defendant's failure to maintain goodwill toward plaintiff's assignor of the two California heirs could or did cause damage to plaintiff or his assignor;

4. How defendant's alleged failure to arrive at an understanding with said two heirs could or did cause damage to plaintiff or his assignor;

5. How defendant's alleged failure to prepare and present [21] orders to said probate court could or did cause damage to plaintiff or his assignor;

6. How defendant's alleged failure to render prompt information concerning said probate matters could or did cause damage to plaintiff or his assignor;

7. How defendant's alleged failure to become a Referee in the partition suit in said probate proceedings could or did cause damage to plaintiff or his assignor.

(c) Said complaint is indefinite in that nowhere in the same is defendant informed as to what he is claimed to have negligently done or omitted in and about any of the proceedings in said probate court, in which he is alleged to have represented the four heirs named in plaintiff's complaint, or in which he was associated as counsel for them with plaintiff's assignor; and particularly said complaint fails throughout to specify any particular proceeding in said probate court in respect of which defendant did or omitted any specific act which in the performance of his duty as an attorney he should have done or should have omitted; and said complaint throughout is likewise indefinite in that nowhere therein does it appear what action was taken by said probate court which was improper or why or how if any improper ac-

tion was taken by said probate court any act or omission of defendant was the proximate cause of such improper action.

Dated: June 20, 1942.

VAN DYKE & HARRIS

B. F. VAN DYKE

Attorneys for Defendant. [22]

To Reuben G. Lenske, Attorney for Plaintiff; and
to H. A. Pierce, Plaintiff:

Please Take Notice that the undersigned will bring the above motions on for hearing before the above entitled Court at the courtroom thereof, United States Courts and Post Office Building, Sacramento, California, on Monday, July 13, 1942, at ten o'clock A. M., of said day, or as soon thereafter as counsel can be heard.

Dated: June 20, 1942.

B. F. VAN DYKE

VAN DYKE & HARRIS [23]

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Monday, the 21st day of September, in the year of our Lord one thousand nine hundred and 42.

Present: The Honorable Martin I. Welsh,
District Judge.

H. A. PIERCE,

Plaintiff,

vs.

ALBERT L. WAGNER,

Defendant.

The motion to dismiss and for a more definite statement came on regularly this day to be heard. B. F. Van Dyke, Esq., was present for and on behalf of the defendant. There was no appearance on behalf of the plaintiff. After hearing Mr. Van Dyke, it is Ordered that the motion to dismiss be and the same is hereby granted, and that this case be and the same is hereby dismissed. [34]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that H. A. Pierce, plaintiff in the above entitled action, does hereby appeal to the United States *Circuit of Appeals* for the Ninth Circuit from that certain judgment or order entered in the above entitled cause on or about September 21, 1942, by the District Court of the United States for the Northern District of California, Northern Division, wherein and whereby said action of plaintiff was dismissed; and H. A. Pierce, appellant, does hereby deposit with the Clerk of the above entitled Court the sum of \$250.00

in lieu of and to function as a cost bond on appeal, to secure the costs on appeal in the event the appeal is dismissed or the judgment is affirmed.

REUBEN G. LENSKE

Attorney for Plaintiff-

Appellant

825 Yeon Bldg.,

Portland, Ore.

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

Attest:

[Seal]

WALTER B. MALING,

Clerk, District Court of the
U. S., Northern District of
California.

By F. M. LAMPERT

Deputy Clerk.

[Endorsed] : Filed Oct. 20, 1942. [34A]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

Comes now the Plaintiff above named, appellant,
and designates the following portions of the record,
for the appeal herein.

1. Complaint
2. Defendant's Motion to Complaint
3. Amended Complaint
4. Defendant's Motion to Amended Complaint
5. Judgment or Order of Dismissal
6. Order of May 6th, 1942.

REUBEN G. LENSKE
Attorney for Plaintiff

State of Oregon
County of Multnomah—ss.

I hereby certify that on September 21, 1942 I
mailed a true copy of the above Designation to Van
Dyke & Harris, attorneys at law, 913 California-
Western States Life Bldg., Sacramento, in an enve-
lope deposited in the Post Office at Portland, Ore-
gon with the postage prepaid thereon.

REUBEN G. LENSKE
Attorney for Plaintiff

[Endorsed]: Filed Nov. 23, 1942. [35]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT ON APPEAL

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing 35 pages, numbered from 1 to 35, inclusive, contain a full, true and correct transcript of certain records and proceedings in the case of *H. A. Pierce vs. Albert L. Wagner*, No. 4311, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the Designation of Contents of Record on Appeal, copy of which is embodied herein.

I further certify that the cost of preparing and certifying the foregoing record on appeal is the sum of Five and 30/100 (\$5.30) Dollars, and that the same has been paid to me by the Attorney for the appellant herein.

In witness whereof, I have hereunto set my hand and the official seal of said District Court, this 4th day of December, A. D. 1942.

[Seal]

WALTER B. MALING,

Clerk

By F. M. LAMPERT

Deputy Clerk. [36]

[Endorsed]: No. 10326. United States Circuit Court of Appeals for the Ninth Circuit. H. A. Pierce, Appellant, vs. Albert L. Wagner, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

Filed December 7, 1942.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 10326

H. A. PIERCE,

Plaintiff-Appellant,

vs.

ALBERT L. WAGNER,

Defendant-Appellee.

DESIGNATION OF POINTS AND
RECORD FOR PRINTING

Comes now appellant and designates the following points on which he intends to rely on the within appeal.

1. The amended complaint states two good causes against defendant for sums totalling in excess of \$3000.00.

2. The amended complaint shows on its face that appellant has good causes against appellee and that the Court has jurisdiction of the causes.

3. The amended complaint states the ultimate facts as required by Federal Rules of Civil Procedure, excepting that the pleading may be too prolix but this was required by the District Court in an order ruling on the original complaint.

Appellant designates for printing the complaint, the defendant's motion to the complaint, consisting of three pages, the amended complaint, the notice of motion to dismiss action consisting of three pages, and the judgment or order of dismissal, the formal portions to be omitted.

REUBEN G. LENSKE

Attorney for Appellant

825 Yeon Bldg.

Portland, Oregon

CERTIFICATE OF SERVICE

State of Oregon

County of Multnomah—ss.

I, Reuben G. Lenske, hereby certify that I served the attached Designation upon appellee by mailing a duly certified copy thereof on December 27, 1942 in the Post Office at Portland in an envelope with the postage prepaid for airmail and so designated, addressed to Van Dyke & Harris, Attorneys at law, 913 California-Western States Life Bldg., Sacramento, California.

REUBEN G. LENSKE

Subscribed and sworn to before me this 27 day of December, 1942.

[Seal]

ASHBY C. DICKSON

Notary Public for Oregon

My commission expires 9/25/43.

[Endorsed]: Filed Dec. 29, 1942.

